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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with Commission on Human Rights resolution 2005/2, the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Summary

The Working Group considers that it is critical to continue to expand upon the work of its predecessor, the Special Rapporteur of the Commission on Human Rights, by revisiting the concept of mercenarism in order to explore how its mandate corresponds to evolving phenomena that may be considered as contemporary forms of mercenarism or mercenary-related activities.

The phenomenon of foreign fighters presents such an opportunity. It further prompts an assessment of the impact of the presence of these actors on human rights, in particular the right to self-determination. The present report is the result of a year-long study by the Working Group on the phenomenon of foreign fighters. The study involved two expert group meetings, a panel, a country visit to Tunisia and the gathering of information obtained through a questionnaire to all Member States, relevant peacekeeping operations and field offices of the Office of the United Nations High Commissioner for Human Rights. The report, which addresses motivation and recruitment practices, the linkages between foreign fighters and mercenaries and the human rights implications of the presence of foreign fighters and related laws and policies, also explores the need for less vague definitions when speaking of the difference between foreign fighters and mercenaries and makes recommendations for addressing the human rights impact of the foreign fighter phenomenon.

I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 27/10 and General Assembly resolution 69/163. In the light of its mandate to monitor mercenaries and mercenary-related activities in all their forms and manifestations, as well as to identify sources and causes, emerging issues, manifestations and trends regarding mercenaries and mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination, the Working Group has chosen to dedicate this report to the subject of foreign fighters.

2. Under the mandate of the Special Rapporteur on the use of mercenaries, who served from 1987 to 2004, it was recognized that mercenary activities assumed new forms and aspects that had not existed in the past. The discussion of the difference between traditional forms of mercenarism and new modalities of mercenary activity was a recurrent topic in his reports,[1] in two of which he reiterated the need to address new forms of mercenary activities and highlighted the linkage between mercenarism and terrorism, citing the existence of actors who are not only recruited to take part in armed conflict but also to participate actively in other activities characterized by extreme violence, hatred and intolerance, and who operate by creating situations conducive to terrorism.[2]

3. In discussing the motivational factor within the context of terrorism, the Special Rapporteur stated that there is nothing to prevent mercenaries from taking part in the commission of a terrorist act, understood to be criminal acts committed for ideological reasons with claims of political legitimacy and with the aim of collective terror.[3]

4. The Working Group aims to explore possible linkages between the phenomena of mercenarism and foreign fighters, and their impact on human rights and the right of peoples to self-determination. It also addresses the challenges in identifying a clear definition of mercenary, thus continuing the line of thinking of the Special Rapporteur on this issue.

5. Foreign fighters are not a new phenomenon. For centuries, individuals have been travelling to other States to fight with armed forces or armed groups unaffiliated to their own country, whether as mercenaries or as foreign volunteers, including during the conflicts in Bosnia and Herzegovina[4] and Afghanistan.[5]

6. In recent years, the reported increase in the numbers of foreign fighters and the range of countries from which they reportedly originate, the groups they join, their motivations and subsequent actions have raised concerns around the world. To stem the flow of foreign fighters, the Security Council has taken action under Chapter VII of the Charter of the United Nations, namely by its resolutions 2170 (2014) and 2178 (2014). The 2014 report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedom while countering

[1] See E/CN.4/2001/19 and E/CN.4/2004/15.
[2] E/CN.4/2001/19, para. 50.
[3] E/CN.4/2004/15, para. 35.
[4] See E/CN.4/1995/29.
[5] See E/CN.4/2004/15.

terrorism also addresses human rights issues relating to foreign fighters and measures taken to stem their flow.[6]

7. This report: (a) provides an overview of the similarities and differences between foreign fighters and mercenaries; and (b) assesses the contemporary phenomenon of foreign fighters, including who they are, what motivates them and how they are recruited. Although the focus is on foreign fighters in the Syrian Arab Republic and Iraq, the report also takes stock of the presence of foreign fighters in other contemporary conflicts. It also examines the measures taken in response to the foreign fighter phenomenon at the national and international levels, and their possible impact on human rights.

8. The Working Group carried out a year-long study on the phenomenon of foreign fighters. It held expert meetings on 3 December 2014 and 5 March 2015, and it organized a panel on the subject on 23 July 2015. The Working Group also solicited information by circulating a questionnaire to all Member States, relevant peacekeeping operations and field offices of the Office of the United Nations High Commissioner for Human Rights (OHCHR). It further undertook a country mission to Tunisia from 1 to 8 July 2015. The Working Group will visit Belgium in October and regrets that it could not visit France and the United Kingdom of Great Britain and Northern Ireland during the course of 2015.

II. Assessing the linkages between the phenomenon of mercenaries and foreign fighters

9. There are a number of similarities and differences between mercenaries and foreign fighters. Among the similarities are the definitions of the two phenomena, as well as their activities. For the purpose of denying mercenaries the rights of combatants or prisoner-of-war status in an international armed conflict, article 47 of the 1977 Additional Protocol I to the 1949 Geneva Conventions defines mercenaries in a series of cumulative elements.[7] The 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries derives its definition from that used in the Additional Protocol. According to the Convention, in addition to fighting in an armed conflict, persons who are recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State, or undermining the

[6] A/HRC/28/28.

[7] United Nations, *Treaty Series*, vol. 1125, No. 17512; article 47:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

territorial integrity of States, are also mercenaries, provided that the other elements are fulfilled.[8] Both the Special Rapporteur on mercenaries[5] and the Working Group have highlighted the need to revisit this narrow definition to encompass the new and emerging manifestations of mercenary-like activities.

10. The currently accepted meaning of the term mercenary is primarily focused on the professional services of persons paid to intervene in an armed conflict in a country other than their own. The concept appears to be linked, though not exclusively, to interference with the right of peoples to self-determination. The use of mercenaries can be linked to other illegal activities, including terrorism, yet none of these aspects falls strictly under the Additional Protocol to the Geneva Conventions.

11. The phenomenon of individuals travelling abroad to fight with armed groups unaffiliated to their own country may be described by various terms, including foreign volunteers, transnational insurgents, Mujahidin (for Muslim foreign fighters) and foreign fighters. There is also the more specific foreign terrorist fighter, a term recently coined by the Global Counter-Terrorism Forum[9] and adopted by the Security Council.[10] The Working Group uses the term foreign fighters, also used by the United Nations High Commissioner for Human Rights[6] and the Independent International Commission of Inquiry on the Syrian Arab Republic.[11] The meaning and linkages between foreign fighters and foreign terrorist fighters are discussed further in paragraphs 21 to 24 below.

12. There is no internationally agreed legal definition of foreign fighters, nor a specific regime governing them. Foreign fighters are obliged to respect applicable rules of international humanitarian law during armed conflicts. In non-international armed conflicts, non-State armed groups, including foreign fighters, do not enjoy combatant immunity and may be prosecuted under domestic law for mere participation in hostilities.

13. The term foreign fighter is generally understood to refer to individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology, as elaborated in paragraphs 25 and 26 below. Additionally, salaries paid to foreign fighters or

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[8] Ibid., vol. 2163, No. 37789, article 1 (2):

A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

[9] The Hague Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, available from: https://www.thegctf.org/documents/10162/159879/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf.

[10] Security Council resolutions 2170 (2014) and 2178 (2014).

[11] A/HRC/27/CRP.3.

promises of financial rewards may be a financial incentive to travel abroad. One possible difference between foreign fighters and mercenaries is that the former may encompass nationals of a party to the conflict, for example when members of the diaspora return to the conflict zone. Reportedly, many of the foreign fighters who joined Al-Shabaab in Somalia were members of the Somali diaspora.

14. There are thus some similarities in the definitions. Both mercenaries and foreign fighters are external actors who intervene in an armed conflict. Mercenaries are neither nationals of a party to the conflict nor residents of a territory controlled by a party to the conflict. Similarly, foreign fighters, while they may or may not be nationals of a party to the conflict, do not reside in the State affected by the conflict and have travelled from abroad to join the insurgency. Both mercenaries and foreign fighters may be recruited abroad or locally: there are reportedly instances where individuals who travelled to a conflict zone with humanitarian motives were subsequently recruited by a local non-State armed group.

15. Foreign fighters and mercenaries are both multifaceted phenomena that have many things in common, ranging from links to acts of terrorism and participation in armed conflicts that may negatively impact human rights, as well as to other criminal activities, including organized crime and smuggling networks.

16. The linkages between foreign fighter mobilizations and terrorism are well-known. Against the background of foreign fighters who travelled to the Syrian Arab Republic and Iraq, the Analytical Support and Sanctions Monitoring Team of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities (or Security Council Al-Qaida Sanctions Committee), established pursuant to resolutions 1267 (1999) and 1989 (2011), reports two key lessons to be drawn from previous foreign fighter mobilizations: (a) overall, less than 15 per cent of former foreign fighters were later involved in terrorist activities; and (b) former foreign fighters nonetheless pose a security risk, as they may return with a range of dangerous skills, beliefs and relationships.[12]

17. Virtually all non-State armed groups frame their struggle as an exercise of their right to self-determination. Foreign fighters may either contribute to or impede the right to self-determination, a right that belongs to "peoples", not to the State.[13] The Working Group has observed that foreign fighters influence domestic insurgencies in ways that may ultimately undermine the right of self-determination. Foreign fighters are likely to reframe and radicalize the overall aims of the insurgency and contribute to its fragmentation and duration.[14] This, in turn, may complicate mediation and negotiations to end the conflict. Foreign fighters often bring in new, radical and unlawful tactics that encourage greater violence towards the civilian population.[15]

[12] S/2015/358, paras. 19 and 20.

[13] Human Rights Committee, general comment No. 12; Committee on the Elimination of Racial Discrimination, general recommendation No. 21.

[14] See Kristin M. Bakke, "Help Wanted? The Mixed Record of Foreign Fighters in Domestic Insurgencies", *International Security*, Vol. 38, No. 4, 2014; and Ben Rich and Dara Conduit, "The Impact of Jihadist Foreign Fighters on Indigenous Secular-Nationalist Causes: Contrasting Chechnya and Syria", *Studies in Conflict & Terrorism*, Vol. 38, No. 2, 2014.

[15] See Jeni Mitchell, "The Contradictory Effects of Ideology on Jihadist War Fighting: The Bosnian Precedent", *Studies in Conflict & Terrorism*, Vol. 31, No. 9, 2015.

18. Experience over time has shown that foreign fighter mobilizations have a significant effect on future conflicts. Some foreign fighters move on to other conflict zones, bringing with them their experience, skills, resources and networks.

19. Both mercenaries and foreign fighters are complex phenomena that involve multiple actors and networks, namely those who recruit, use, train, and finance them. In his reports to the Commission on Human Rights, the Special Rapporteur repeatedly drew attention to the involvement of mercenaries in organized crime and smuggling networks of people, drugs and arms.[16] The Security Council Counter-Terrorism Committee reported that the travel of foreign fighters is now much more organized, often backed by financial networks, and facilitated in some instances by criminal networks that arrange border crossings and provide fraudulent documents.[17] While most foreign fighters reportedly fund their own travel, including by illegal sources of income, recruitment networks may also fund their travel.[18] In the light of information on the growing ties between terrorist groups and networks smuggling people, arms and drugs, the Security Council Al-Qaida Sanctions Committee has warned that foreign fighters may become a resource for criminal networks in the future.[19]

III. Assessing the foreign fighter phenomenon

20. In this section, the Working Group provides an overall assessment of the contemporary phenomenon of foreign fighters, exploring the notion of foreign fighters, in particular with respect to its contemporary usage and its linkages with the more recent term foreign terrorist fighter, and examining the motivations and the recruitment of foreign fighters.

A. Who is a foreign fighter?

21. As noted above, there is no international legal definition of the term foreign fighter, and none of the Member States consulted by the Working Group have adopted a definition of the term in their national legal frameworks.

22. The usage of the term fighter may be misleading: Under international humanitarian law, individuals commonly labelled "fighters" are covered by a number of terms of art, including members of dissident armed groups or other organized armed groups, or civilians who take a direct part in hostilities. Persons who assume exclusively non-combat functions, such as administrative, political or propaganda functions, do not directly participate in hostilities under international humanitarian law. In order to determine whether foreign fighters are indeed directly participating in hostilities, as understood under international humanitarian law, much more needs to be known about their functions and roles after their travel. The same applies when the term foreign terrorist fighter is used.

23. Against the background of the influx of foreign fighters to the Syrian Arab Republic and Iraq, an even more extensive understanding of the term foreign

[16] E/CN.4/1995/29, para. 23, and E/CN.4/2004/15, para. 57.
[17] S/2015/123, para. 32.
[18] S/2015/358, para. 34.
[19] Ibid., para. 43.

fighter, or foreign terrorist fighter, has evolved. In its current usage, the term covers not just individuals who travel to become involved in violence within an insurgency or non-State armed group, but also other forms of assistance, support or association with non-State armed groups.

24. Both the Security Council Al-Qaida Sanctions Committee and the Security Council Counter-Terrorism Committee report that the current foreign terrorist fighter mobilization includes minors and a significant number of women.[20] Some women travel with their husbands and families, while others hope to marry and start families. Some are believed to join all female units to ensure that women in areas controlled by the Islamic State in Iraq and the Levant (ISIL) abide by the group's strict rules.

B. Motivation

25. There is no typical profile of foreign fighters. Individuals may be motivated to travel for different reasons, and motivations for being a foreign fighter may also change over time. Motivational factors may be grouped together into reasons linked to: identity; the search for greater meaning in life; the desire to belong to a group or to gain peer acceptance; boredom; alienation; adherence to ideology, such as religion; kinship, nationalism or patriotism; and humanitarian reasons, namely to protect the local population.

26. Financial or material gain appears to be one factor among others that may motivate foreign fighters. Some Member States reported to the Working Group that promises of financial gain played a role in the recruitment of foreign fighters in their territory, but the majority indicated that financial or material incentives did not play any role. Similar findings were made by the Security Council Al-Qaida Sanctions Committee, which reports that the payment of salaries by ISIL may be an incentive for some fighters.[21] The Security Council Counter-Terrorism Committee states that some foreign fighters are paid to travel and they and their families are financially supported after moving abroad. In other instances foreign fighters fund their own travel and cover their own expenses while abroad.[22]

C. Recruitment

27. Groups and their supporters deploy various recruitment narratives to resonate with and influence personal motivations. Recruitment narratives may be humanitarian, highlighting the brutality of the enemy and the suffering of the local population while celebrating the heroism of fighters protecting the locals. Common religious narratives portray an existential threat to the community requiring a defensive mobilization of foreign fighters. Local grievances may also be exploited. The Security Council Counter-Terrorism Committee repeatedly warned that counter-terrorism measures that do not fully respect human rights and the rule of law contribute to radicalization and may fuel foreign fighter mobilization.[23] Finally,

[20] S/2015/123, annex, para. 14; S/2015/338, annex, para. 20; and S/2015/358, para. 28.

[21] S/2015/358, para. 29.

[22] Ibid., S/2015/338, annex, paras. 80 and 81.

[23] S/2014/807, annex, para. 25, and S/2015/123, annex, para. 30.

recruitment narratives also promise adventure and denigrate those who are unwilling to travel.

28. Given the significant proportion of minors who are known to have travelled, it is clear that recruitment narratives and strategies are deliberately targeting young people. ISIL also uses gender-specific narratives to recruit both men and women, centring on a new society to be built for fighters and their families.[24]

29. The Internet and social media play an increasingly important role in the recruitment of foreign fighters, although direct social contact remains important. In particular, active foreign fighters are instrumental to the recruitment of potential new foreign fighters.[25]

D. Foreign fighters in contemporary armed conflicts

30. Although not a new phenomenon, the overall number of foreign fighters, and the number of countries from which they reportedly originate, has increased sharply in recent years. In its report submitted in May 2015, the Security Council Al-Qaida Sanctions Committee estimated that today there are more than 25,000 foreign fighters from more than 100 States Members of the United Nations involved with groups associated with Al-Qaida.[26]

31. Since 2012, the Syrian Arab Republic has become a magnet for foreign fighters, who join various armed groups representing diverse interests. Reported foreign fighters on the side of the Government are not included in the overall estimates of foreign fighters provided by the Security Council Al-Qaida Sanctions Committee.

32. Foreign fighters joined various groups of the armed opposition, but a large majority joined ISIL, and to a lesser degree Al-Nusrah Front. Both groups began as Al-Qaida associates and are designated as such by the Al-Qaida Sanctions Committee. ISIL, which evolved out of Al-Qaida in Iraq, is led by, Abu Bakr al-Baghdadi, an Iraqi, and its leadership is also dominated by Iraqis. Against the background of the conflict in the Syrian Arab Republic, ISIL is often described as foreign dominated. This is in contrast to the official Syrian Al-Qaida affiliate, Al-Nusrah, led by Syrians who previously fought with Al-Qaida in Iraq during the Iraqi insurgency years. Other recent reports have highlighted instances of individuals who have travelled to join forces fighting against ISIL, for example alongside the Kurdish People's Protection Units.

33. The armed conflicts in the Syrian Arab Republic and Iraq are the driving force behind the global increase in foreign fighters, although the presence of such fighters is reported to varying degrees in other contemporary armed conflicts. Of these, the greatest concentration is in Afghanistan, with a growing influx to Libya. Smaller numbers are also present in Yemen, Pakistan, Somalia, the Maghreb and Sahel

[24] See Erin Marie Saltman and Melanie Smith, "'Till Martyrdom Do Us Part'. Gender and the ISIS Phenomenon", Institute for Strategic Dialogue, 2015; Carolyn Hoyle, Alexandra Bradford, Ross Frenett, "Becoming Mulan? Female Western Migrants to ISIS", Institute for Strategic Dialogue, 2015. Both reports are available from: http://www.strategicdialogue.org/publications/.

[25] S/2015/358, paras. 52 and 53.

[26] Ibid., para. 10.

countries and the Philippines.[27] The Nigerian group Boko Haram also reportedly recruits fighters from neighbouring countries.[28] In addition, recent reports highlight instances of Western foreign fighters joining both sides of the conflict in eastern Ukraine.[29]

E. Country visit to Tunisia

34. In addition to information gained through research, the visit of the Working Group to Tunisia allowed it to assess the complexity of the phenomenon. In Tunisia, the Working Group was informed that motivational factors responsible for the high number of Tunisian foreign fighters is both complex and varied, including religious and political ideologies; financial gain; poor economic and social conditions; the search for a sense of purpose and a sense of belonging. The majority of Tunisians travelling to join extremist groups abroad seem to be young, usually between 18 to 35 years old. Some of these individuals come from poor socioeconomic backgrounds, although some also come from the middle class and the wealthier strata of society. The Working Group was also provided with information about professionals who offer their skills to extremist groups, and was told that some seem to have been mistakenly drawn to a life portrayed as brave and exciting. Reportedly, women, present in smaller numbers, may have also joined for similar reasons, as well as for humanitarian or private reasons, such as joining their husbands and partners. The Working Group was also informed of the growing issue of entire families travelling to conflict zones. Any one or a combination of these factors may be relevant, contributing to significantly diverse profiles of foreign fighters. It was the conclusion of the Working Group that efforts to address this phenomenon must therefore be holistic, multifaceted and strategic.

IV. Impact of the activities of foreign fighters on human rights, including the right to self-determination

35. Pursuant to its mandate, the Working Group considers it necessary to examine the potential impact of foreign fighters on human rights, in particular the right of peoples to self-determination.

A. Foreign fighters and the right to self-determination

36. The right of peoples to self-determination is enshrined in the Charter of the United Nations, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The General Assembly has repeatedly reaffirmed the right of peoples to self-determination, and

[27] S/2015/358, para. 26 (information provided by OHCHR field offices).

[28] S/2015/338, para. 5 (information provided by OHCHR field office); Ely Karmon, "Boko Haram's International Reach", *Perspectives on Terrorism*, vol. 8, No. 1, 2014; "Captured video appears to show foreign fighters in Nigeria's Boko Haram", *The Guardian*, 27 May 2015.

[29] "Ukraine war pulls in foreign fighters", *BBC News*, 1 September 2014; "Ukraine conflict: Spanish suspects held for 'joining rebels'", *BBC News*, 27 February 2015.

specifically the right to freely determine their political status and to pursue their economic, social and cultural development.[30]

37. Initially, the right of peoples to self-determination developed in the context of non-self-governing territories and peoples who were subjected to alien subjugation, domination and exploitation in such a way as to create a legal right to independence.[31]

38. In its contemporary manifestation, the right of peoples to self-determination encompasses political struggles for greater democracy and human rights, in particular as a manifestation of the so-called internal right to self-determination, as distinct from the external right to self-determination in the sense of a legal right to independence.[32] According to the Human Rights Committee, the realization of the right to self-determination is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.[33] The exact contours of the right to internal self-determination remain uncertain, but the right is broadly understood as the right of peoples to determine their own political and economic system, including by participatory political processes.

39. The beneficiaries of the right to self-determination are peoples, not States, although the precise definition of which people or which group of people are entitled to that right is as yet unclear. Previously, outside the colonial context, peoples were equated with the whole population of the State, with the corollary that minorities and indigenous peoples were not entitled to this right. In two decisions, the African Commission on Human and Peoples' Rights accepted that a group of persons with common culture, language, history, occupying a distinct territory and self-identifying as a people with separate and distinct identity may constitute a people for the purposes of self-determination.[34]

40. Virtually all non-State armed groups frame their struggle as an exercise of the peoples' right to self-determination. The Working Group does not address the question whether resort to force to exercise the right to self-determination may be legitimate under certain circumstances. For present purposes, it notes that foreign fighters are not inevitably impeding the right to self-determination. Such a concept would involve the false assumption that the right to self-determination belongs to the State. Foreign fighters may be motivated to join a non-State armed group to help them exercise the right to self-determination, or fight on behalf of armed groups claiming to exercise this right.

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[30] Resolutions 1541 (XV), 2625 (XXV) and 60/145.

[31] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004* (I).

[32] For present purposes, the Working Group does not need to address the controversial question as to whether and under which circumstances a people outside the colonial context may be entitled to external self-determination or remedial secession.

[33] See Human Rights Committee, General Comment No. 12.

[34] *Katangese Peoples' Congress v. Zaire*, Communication No. 75/92, African Commission on Human and Peoples' Rights, 8th Annual Activity Report (1995); *Kevin Mgwanga Gunme v. Cameroon*, Communication No. 266/2003, African Commission on Human and Peoples' Rights, 26th Annual Activity Report (2008-2009).

41. In many instances, foreign fighter mobilizations are exogenous to a domestic insurgency. They are rarely involved during the initial outbreak of an armed conflict. Local insurgent groups may have appealed to outsiders for funds and weapons, but the mobilization of foreign fighters is usually initiated and handled by foreigners rather than locals.

42. Foreign fighters often have markedly different ideological and political motivations and aspirations than local armed groups. Their influx may significantly transform the domestic secular-nationalist or democratic causes that initiated the conflict, including in the way that the conflict is perceived by the international community.

43. Foreign fighters, in particular veterans of previous conflicts, bring not only themselves, but also weapons, connections, funds and tactics. The Working Group has observed that foreign fighters may introduce more radical methods of warfare, encouraging the targeting of civilians or fostering sectarian violence. For example, Al-Shabaab's adoption of suicide bombings is traced back to the influx of foreign fighters associated with Al-Qaida. The Independent International Commission of Inquiry on the Syrian Arab Republic reported that the flow of foreign fighters has driven forward the radicalization process in areas held by armed groups.[35]

44. Foreign fighters may also prolong conflicts and render them more intractable. They may complicate efforts to mediate and negotiate a political settlement. Their radicalization of tactics and ideological influence erodes national and international support for the opposition and frequently undermines the cohesion of the armed opposition. Their influx may also cause infighting in the armed opposition, with groups disagreeing over tactics and goals, such as, for example, in Iraq with the Shia militia during the insurgency against the international forces led by the United States of America, or more recently, the scission between ISIL and other non-State armed groups in the Syrian Arab Republic. Foreign fighters may be instrumental in the success of a group, but there may also be frictions between the foreigners and the locals within the group. At one point, Al-Shabaab included many foreign fighters and its leadership was dominated by foreigners, but the group has recently purged its foreign fighters.[36]

45. The impact of foreign fighters may extend well beyond their current involvement in an armed conflict. Some foreign fighters may move on to future conflict zones. With combat experience and established networks for funds and weapons, such veteran foreign fighters often come to play important roles. For example, foreign fighters arrived at the later stages of the post-Soviet invasion war in Afghanistan, and many veterans moved on to emerging conflict zones where they played an important role in later conflicts in the Middle East and South Asia, and also in Europe during the war in Bosnia and Herzegovina. The Security Council Al-Qaida Sanctions Committee reports that the numerous senior commanders who are ethnic Chechens illustrate the disproportionate role of veterans in the contemporary campaign of ISIL and the Al-Nusrah Front.[37] In a similar dynamic,

[35] A/HRC/28/69 and Corr.1.

[36] S/2015/358, para. 41; Raffaello Pantucci and A. R. Sayyid, "Foreign Fighters in Somalia and al-Shabaab's Internal Purge", *Terrorism Monitor*, vol. 11, No. 22, 2013; Jeremy Scahill, "The Purge: How Somalia's Al-Shabaab Turned Against Its Own Foreign Fighters", *The Intercept*, 20 May 2015.

[37] S/2015/358, para. 9.

the outbreak of the conflict in the Syrian Arab Republic remobilized Syrians who once were foreign fighters themselves, in particular during the Iraqi insurgency. Reportedly, Al-Nusrah's leadership is made up of Syrian veterans who previously fought in the Iraqi insurgency, although the group also attracts many foreign fighters.

B. The impact of foreign fighters on human rights

46. Foreign fighters often contribute to the adoption of more radical methods of warfare, encouraging the targeting of civilians or fostering sectarian violence. With limited connections to the local population, foreign fighters may be more brutal, as has been seen repeatedly in the Syrian Arab Republic and Iraq. The acts of foreign fighters may amount to gross human rights violations,[38] war crimes and crimes against humanity or genocide. Ensuring the accountability of foreign fighters involved in such abuses and crimes is critical. Whenever possible, the States of nationality or permanent residency should effectively investigate and prosecute foreign fighters involved in such acts.

47. During armed conflicts, foreign fighters are obliged, as are all other members of State armed forces or non-State armed groups party to the conflict, to respect the applicable rules of international humanitarian law, in particular the minimum standards enshrined in article 3 common to the four Geneva Conventions of 1949 concerning the treatment and protection of civilians and others who are not or no longer actively participating in hostilities. This includes the prohibition of murder, torture and the taking of hostages. Customary international humanitarian law requires all parties to a conflict to respect the principle of distinction and proportionality in their military operations and prohibits attacks whose primary purpose is to spread terror. Serious violations of humanitarian law, including acts of terrorism, may amount to war crimes, triggering individual criminal responsibility.

48. International human rights law continues to apply during situations of armed conflict. As is the case with all other members of State armed forces or non-State armed groups, foreign fighters are, at a minimum, bound by the peremptory norms of international law, including prohibitions on: the arbitrary deprivation of life; genocide; slavery; racial discrimination; torture and other cruel, inhuman or degrading treatment; the taking of hostages, the imposition of collective punishment; and the arbitrary deprivation of liberty. When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, acts such as murder, torture, rape and other forms of sexual violence, or enforced disappearance, constitute a crime against humanity.[39] In addition, non-State armed groups that exercise effective control over territory, such as ISIL, are increasingly considered to be bound by international human rights obligations in relation to all people within that territory.[40]

[38] http://uniraq.org/images/humanrights/HRO_PoCReport%2011Sept-10Dec_FINAL_ENG_16Feb2015.pdf.

[39] A/HRC/28/28, para. 41.

[40] A/HRC/10/22, para. 22; A/HRC/15/48, paras. 19-22; Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 2011, para. 188; A/HRC/17/44, para. 42; A/HRC/21/50, para. 10.

49. The Independent International Commission of Inquiry on the Syrian Arab Republic and the United Nations Assistance Mission for Iraq (UNAMI) and OHCHR have documented human rights abuses, violations of international humanitarian law, and crimes committed by ISIL extensively,[41] including executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, forcible displacement, enforced disappearance, the wanton destruction of cultural property and the enlistment and forced recruitment of children. The Independent International Commission also reported that ISIL forcibly displaced Kurdish families and gave their property to foreign fighters.[42] Finally, the Commission documented the involvement of foreign fighters in the recruitment and training of children.[43] In December 2014, the United Nations High Commissioner for Human Rights stated that members of ISIL are likely responsible for war crimes and crimes against humanity, subject to determination by a competent court. Particularly in respect of the Yazidis, acts constitutive of the crime of genocide may have been perpetrated by individuals within the ISIL leadership.[44]

50. Non-State armed groups are also recruiting and using foreign fighters under the age of 18 in hostilities, with reported instances of fighters under the age of 15. Customary international humanitarian law prohibits the recruitment of children below the age of 15 during both international and non-international armed conflicts. Human rights law prohibits the compulsory recruitment of children under 18 into State armed forces and the recruitment of children under 18 by non-State armed groups. Both the Security Council Al-Qaida Sanctions Committee and the Security Council Counter-Terrorism Committee report that young boys and girls under the age of 18 are being targeted and encouraged to travel abroad,[45] and ISIL, in particular, is reportedly using significant numbers of minors as fighters.[46]

V. Responses to the foreign fighter phenomenon

51. The reported increase in the number of foreign fighters and in the range of countries from which they originate have prompted States and the international community to take measures to curtail the flow of foreign fighters. The Working Group presents a brief discussion of these measures and their potential impact on human rights in section A below. The conclusions of the Working Group include reflections on the existing gaps or weaknesses in the response to the foreign fighter phenomenon.

A. Measures taken by States and the international community

52. The Security Council has adopted two resolutions addressing the foreign fighter phenomenon. In its resolution 2170 (2014), the Council condemned the recruitment of foreign terrorist fighters by ISIL, Al-Nusrah and other entities

[41] See A/HRC/27/CRP.3 and UNAMI/OHCHR, Report on the Protection of Civilians in Armed Conflict in Iraq: 11 September-10 December 2014.
[42] A/HRC/28/69 and Corr.1, annex II, paras. 277-279.
[43] Ibid., paras. 102 and 167.
[44] A/HRC/28/28, para. 43.
[45] S/2015/358, para. 29; and S/2015/123, para. 40.
[46] S/2015/358, para. 30.

associated with Al-Qaeda, and demanded that they withdraw. The Council also called upon Member States to take measures at the national level to suppress the flow of foreign terrorist fighters, reiterating the obligations deriving from previous counter-terrorism resolutions to prevent their movement, their supply with weapons or financial support. The Council also stressed the importance of bringing foreign terrorist fighters of ISIL, Al-Nusrah and others associated with Al-Qaeda to justice.

53. Security Council resolution 2170 (2014) was limited to foreign fighters linked to ISIL, Al-Nusrah and other entities associated with Al-Qaeda. Security Council resolution 2178 (2014), binding on Member States, provides a regulatory framework for foreign terrorist fighters, defined as "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict".[47] To stem the flow of foreign fighters, the Council decided that Member States shall, consistent with international human rights law, international refugee law and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of foreign terrorist fighters. In particular, the Council decided that States shall establish as a serious criminal offence the travel, or attempted travel, of individuals to a State, other than their States of residence or nationality, to perpetrate, plan, prepare or participate in terrorist acts or to provide or receive terrorist training, as well as financing, organization or other facilitation, including recruitment, of such travel. In the past few years, at least 30 Governments around the world have enacted laws or policies to stop their nationals from joining armed extremist groups in foreign countries.

54. The references to "terrorism" and "terrorists" as a category of individuals without qualification or further definition prompted concerns that the resolution may fuel the adoption of repressive measures at the national level against otherwise lawful, non-violent activities of groups or individuals.[48]

55. Adopted against the background of the influx of foreign fighters into the Syrian Arab Republic and Iraq, the intended effect of the resolution is to criminalize travel or attempted travel abroad of foreign fighters for terrorist purposes, namely when they intend to join non-State armed groups that are listed as Al-Qaida associates by the Security Council Al-Qaida Sanctions Committee. The Security Council underscored the particular and urgent need to implement resolution 2178 (2014) with respect to foreign fighters associated with ISIL, Al-Nusrah Front and entities associated with Al-Qaida as designated by the Sanctions Committee. In this sense, foreign terrorist fighters may be understood as a subcategory of foreign fighters.

56. However, the effects of the resolution are not necessarily limited to such fighters. Without a universally agreed upon definition of terrorism, there is no agreement on which acts or which groups qualify as terrorist. The distinction between foreign fighters and foreign terrorist fighters depends on the definition of terrorism employed by individual Member States. States may selectively implement the resolution and take measures against foreign fighters who are travelling to or attempting to travel to join groups that are not, or are no longer, supported by them. Additionally, as pointed out by the Independent International Commission of

[47] Security Council resolution 2178 (2014), eighth preambular paragraph.

[48] A/HRC/28/28, paras. 46 and 47.

Inquiry, influential States have been supporting parties on both sides of the conflict in the Syrian Arab Republic to further their own geopolitical interests.[49]

57. The implementation of Security Council resolution 2178 (2014) may lead to de facto prohibitions against travel to conflict zones and neighbouring States which are known destinations of foreign fighters. Under the Australian Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014,[50] a person who "enters, or remains, in an area of a foreign country"[51] that is declared by the Ministry of Foreign Affairs an area where "a listed terrorist organisation is engaging in hostile activity",[52] commits an offence, unless that person enters, or remains, solely for legitimate purposes, such as humanitarian aid, journalism or visiting family members.[53] Al-Raqqa province in the Syrian Arab Republic and Ninewa province in Iraq are such declared areas.[54] Such legislation potentially violates a number of international human rights protections. It criminalizes travel to and presence in declared areas without regard to any criminal intent and requires individuals to show that their travel and presence in declared areas is for "legitimate purposes".

58. At the regional level, in May 2015, in response to Security Council resolution 2178 (2014), the Council of Europe adopted an Additional Protocol to the Convention on the Prevention of Terrorism to address the phenomenon of terrorist fighters, as well as an action plan to fight violent extremism and radicalisation leading to terrorism.

59. Other States have adopted or are discussing a wide range of administrative and legislative measures to deter individuals who are, or seek to become, foreign fighters. Such measures include broader powers to confiscate or cancel travel documents,[55] administrative travel bans,[56] and revocations of citizenship.[57] Some States have invoked the threat posed by foreign fighters to introduce or extend broader surveillance powers,[58] and confer broader powers upon the intelligence services, such as warrantless emergency surveillance,[59] or powers of arrest, detention, search and seizure.[60]

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[49] A/HRC/28/69 and Corr.1, paras. 116-120.

[50] Australian Government, Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014, available from: www.comlaw.gov.au/Details/C2014A00116.

[51] Ibid., Section 119.2 (1) (a) and (b).

[52] Ibid., sect. 119.3 (1).

[53] Ibid., see the list of legitimate purposes set out in sect. 119 (2).

[54] See the list of "declared areas", available from: www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx. Accessed 27 April 2015.

[55] Australia, Counter-Terrorism Legislation Amendment (Foreign Fighter) Act 2014, No. 116, available from: www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s976.

[56] French Law No. 2014-1353 of 13 November 2014, available from: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029754374&dateTexte=&categorieLien=id.

[57] Strengthening Canadian Citizenship Act 2014, available from: www.parl.gc.ca/HousePublications/Publication.aspx?doc=C-24&pub=bill&File=30#2; United Kingdom, 2014 Immigration Act, available from: www.legislation.gov.uk/ukpga/2014/22/contents/enacted.

[58] A/HRC/28/28, para. 25.

[59] New Zealand, Countering Terrorist Fighters Legislation Bill, available from: www.legislation.govt.nz/bill/government/2014/0001/21.0/DLM6316017.html.

[60] Australia, Counter-Terrorism Legislation Amendment (Foreign Fighter) Act 2014, No. 116, Section 119.2 (1) and (2), available from: www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=s976.

60. States have been mainly relying on existing legislation to investigate and prosecute individuals for acts associated with the foreign fighter phenomenon, including recruitment, incitement and the planning of terrorist acts, as well as travel or attempted travel for such purposes. To the extent that existing and new legislation is not limited to foreign terrorist fighters as defined by Security Council resolution 2178 (2014), the measures adopted by States may go beyond the requirements of the resolution. None of the Member States consulted by the Working Group have adopted a definition of foreign terrorist fighters for the purpose of their legislative and policies measures designed to interrupt their flow.

61. For purposes of controlling the travel of potential terrorist fighters, States have resorted not only to terrorism-specific legislation, but also to legislation dealing with organized crime, immigration law offences, penal provisions linked to threats to national security or the prohibition of unauthorized military training.[61] Some States have adopted[62] or are debating[63] new laws that ban participation in hostilities abroad without specifying that there may be a possible terrorist purpose. Similarly, in some instances, travel bans are not limited to reasonable grounds upon which to claim that a person intends to participate in acts of terrorism, but more broadly include travel abroad to areas where terrorist groups are operating.[56]

62. The definition of foreign terrorist fighters in Security Council resolution 2178 (2014) conveys the idea that these fighters are foreign because they travel abroad to a State other than their State of nationality or residency. The resolution does not provide any guidance on how to interpret residency, which may have different meanings under national law. The interplay between the two possibilities of travelling to a State other than the State of one's nationality or one's State of residency may lead to divergent interpretations, in particular when considering the situation of members of the diaspora and dual citizens.

63. Some States have also gone beyond the obligations enshrined in Security Council resolution 2178 (2014) by taking measures to deny entry to their own nationals suspected of involvement in terrorism-related activity abroad.[64] When deciding that States shall deny entry or transit of suspected foreign terrorist fighters, the Council specified that this shall not oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents.

64. In addition, resolution 2178 (2014) does not exempt acts that are otherwise lawful under international humanitarian law, and may lead to the presumption that mere participation in hostilities and in other acts that are lawful under international humanitarian law amount to a terrorist or terrorist-related offence, regardless of any specific criminal intent. Acts designated as "terrorist" in peace time are prohibited by international humanitarian law if committed in the context of armed conflict, including executions of civilians and persons no longer participating in hostilities,

[61] S/2015/123, annex, paras. 16-19 and 21.

[62] See for example the 2014 amendment to the criminal code of Bosnia-Herzegovina, available from: www.coe.int/t/dlapil/codexter/Country%20Profiles/Legislation/BiH%20Criminal%20Code%20Article%20162b%20-%20draft.pdf.

[63] Such as Kuwait, Montenegro or Norway. See Library of Congress, Treatment of foreign fighters in selected jurisdictions: country surveys, available from: www.loc.gov/law/help/foreign-fighters/country-surveys.php.

[64] United Kingdom, 2015 Counter-Terrorism and Security Act, available from: www.legislation.gov.uk/ukpga/2015/6/contents/enacted.

hostage-taking and direct and deliberate attacks against civilians and civilian objects. However, mere direct participation in hostilities is not prohibited, nor is it a war crime. Under domestic law, armed opposition fighters could always be prosecuted for mere participation in hostilities, including as an act of terrorism. However, international humanitarian law recommends amnesties for the mere participation in hostilities.

65. The prohibition to travel for the purpose of a future involvement in terrorist acts, as well as the prohibition of direct and indirect funding, organization and other facilitation of such travel, has prompted concerns that Security Council resolution 2178 (2014) may hinder humanitarian protection and assistance in conflict zones. It may lead to a presumption that individuals who travel to an area of conflict have criminal intent or are supporting or engaging in criminal terrorist activity, even if they claim humanitarian motives. The Security Council Counter-Terrorism Committee reported that foreign fighters are instructed to claim that the purpose of their travel is to provide humanitarian aid.[65]

B. Human rights concerns

66. As already noted, Security Council resolution 2178 (2014) imposes sweeping obligations to curtail the phenomenon of foreign terrorist fighters. However, without providing a definition of terrorism or terrorist acts, the resolution may fuel the adoption of measures at a national level that rely on an overly vague or broad definition of terrorism and fail to clearly define the proscribed conduct. Overly vague or broad definitions of terrorism violate the principle of legality, which requires that the imposition of criminal liability is limited to clear and precise provisions with respect for the principle of certainty of the law. Such laws may also be used to cover peaceful acts, to discriminate against particular individuals or groups or to limit any sort of political opposition.[66]

67. In the context of the foreign fighter phenomenon, vague definitions of terrorism that potentially cover all acts of violence in an armed conflict, regardless of their lawfulness under international humanitarian law, may lead to selective investigations and prosecutions, depending on the group a foreign fighter has joined or had intended to join. With the myriad of non-State armed groups operating in the Syrian Arab Republic, it may not always be possible for an individual to foresee whether joining a particular group may be criminalized at some point in the future. Recent reports have highlighted instances where prosecutions against returning foreign fighters collapsed because they had joined groups that were supported by the prosecuting State, including by military assistance.

68. A number of States have taken measures to curtail the movement of foreign fighters, including travel bans and the withdrawal of passports. Such measures have an impact on the right to freedom of movement, as enshrined in article 12 of the International Covenant on Civil and Political Rights. While the right to freedom of movement is not absolute, limitations must be lawful, pursuant to a legitimate aim, and must be necessary to achieve that aim.

[65] S/2015/123, para. 25, and S/2015/358, para. 56.

[66] A/HRC/28/28, para. 48.

69. Some States have introduced or are debating exclusion orders to prevent their own nationals or permanent residents from returning. The right to freedom of movement includes the right to enter one's own country and, as explained by the Human Rights Committee in its general comment No. 27, covers, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered a mere alien, such as nationals of a country who have been stripped of their nationality in violation of international law.[67] The Committee further specified that there were few, if any, circumstances in which the deprivation of the right to enter one's own country could be considered reasonable.[68] Such measures may also interfere with the right to privacy and family life.

70. Some States have adopted broader powers to revoke the citizenship of suspected foreign fighters, and such powers may engender statelessness. Some new foreign fighter laws[69] allow authorities to strip citizens convicted of terrorism related offenses of their nationality, provided they are also citizens of another country. Some of these laws apply to naturalized citizens only. Given the significant impact that any interference with the enjoyment of nationality has on the enjoyment of rights, the loss or deprivation of nationality must meet certain conditions in order to comply with international law, in particular the prohibition of arbitrary deprivation of nationality.[70] These conditions also include serving a legitimate purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected.[71]

71. Measures such as travel bans, the revocation of passports, exclusion orders and the revocation of citizenship also raise important due process concerns, in particular if decisions are taken following secretive proceedings, in absentia, on the basis of vaguely defined criteria or without adequate procedural safeguards to guarantee non-arbitrariness.

72. Many States have also broadened existing surveillance powers.[72] Resolution 2178 (2014), inter alia, called upon States to require airlines to provide advance passenger information to the appropriate national authorities in order to detect departure from their territories or attempted entry into or transit through their territories by foreign terrorist fighters. The Security Council also encouraged Member States to employ evidence-based traveller risk assessment and screening procedures, including collection and analysis of travel data, without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law. Such measures interfere with the right to privacy. States must ensure that such measures are necessary and proportionate to the specific risk being addressed and are accompanied by adequate procedural safeguards and effective and independent oversight to ensure that discriminatory measures and/or the abusive use of personal data is prevented.[73] Other measures allow for individuals known to have travelled to the Syrian Arab Republic to be deleted from city council records, thus stripping them of access to social welfare benefits.

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[67] CCPR/C/21/Rev.1/Add.9, para. 20.
[68] Ibid., para. 21.
[69] Such as in Austria and Belgium.
[70] See A/HRC/13/34, A/HRC/19/43 and A/HRC/25/28.
[71] A/HRC/28/28, paras. 51 and 52.
[72] Ibid. (for an overview), paras. 24 and 25.
[73] A/HRC/28/28, para. 51.

73. States have resorted to detaining suspected foreign fighters without respect for the safeguards that are due under international law to all persons deprived of their liberty, in particular by extending the length of permissible pre-charge detention without judicial supervision or review of the reasons of detention.[74]

74. The conflicts in States affected by foreign fighters have caused significant movements of refugees. States must ensure that measures taken to prevent entry or transit of suspected foreign fighters do not violate their obligations under international refugee law, in particular the principle of non-refoulement.

C. The way forward

75. In its resolution 2178 (2014), the Security Council recognized that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors. These include preventing radicalization to terrorism; stemming recruitment; inhibiting the travel of foreign terrorist fighters, disrupting financial support to foreign terrorist fighters, and countering violent extremism that may be conducive to terrorism; countering incitement to terrorist acts motivated by extremism or intolerance; promoting political and religious tolerance, economic development, social cohesion and inclusiveness; ending and resolving armed conflicts; and facilitating reintegration and rehabilitation.

76. In the same resolution, the Security Council underscored that countering violent extremism, including preventing radicalization, recruitment and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters, is an essential element of efforts to address the threat to international peace and security posed by foreign terrorist fighters.

77. National measures and policies have so far concentrated on curtailing the phenomenon of foreign fighters from a security perspective, focusing on repressive and coercive measures. In its preliminary analysis of the principal gaps in the capacity of Member States to implement Security Council resolutions 1373 (2001) and 1624 (2005) that may hinder their ability to stem the flow of foreign terrorist fighters pursuant to Council resolution 2178 (2014), the Security Council Counter-Terrorism Committee stressed that significant gaps remain in State practice to counter violent extremism.[75] In its report submitted in May 2015, the Committee reported that several States had initiated measures to counter violent extremisms, including by producing or facilitating counter-narratives and engaging with local communities.[76]

78. As part of a comprehensive and strategic approach that guarantees respect for human rights and the rule of law to curtail the flow of foreign fighters, preventive approaches must be balanced with repressive approaches, including prosecutions. Blanket attempts to prosecute all aspiring and returning foreign fighters could have a radicalizing effect and reinforce recruitment narratives. When repressive counter-terrorism measures are not sufficiently targeted, entire communities may feel

[74] See for example the Malaysian Prevention (Amendment and Extension) of Crime Act 2014. This is set to be further expanded by the recently tabled Foreign Fighters Act and the Prevention of Terrorism Act.

[75] S/2014/807, annex, paras. 22 and 23.

[76] See S/2015/338.

victimized. In respect of foreign fighters that are under the age of 18, States must ensure that any measures taken against them are in compliance with international human rights law safeguarding the rights of children. In its report submitted in February 2015, the Security Council Committee recognized that in some instances the application of certain legislation or prosecutions could be counter-productive, and that a different approach may be contemplated for minors.[77]

79. Preventive strategies should also address the broader conditions conducive to foreign fighter mobilizations, including violations occurring with impunity during prolonged armed conflicts, discrimination and political exclusion and socioeconomic marginalization. Recruitment narratives exploiting such grievances are reinforced when States take measures that aggravate rather than address them, for example by cooperating with a repressive regime, or exclusionary policies such as deprivation of citizenship.

80. In its resolution 2178 (2014), the Security Council recognized that addressing the threat posed by foreign terrorist fighters requires facilitating reintegration and rehabilitation. In its initial report on gaps that may hinder the implementation of that resolution the Security Council Counter-Terrorism Committee noted that one particular gap in the agenda of many States was the lack of effective strategies and programmes for the rehabilitation and reintegration of returning foreign terrorist fighters, and also noted that the Council, in its resolution 2178 (2014), had requested States to adopt prosecutorial strategies to hold foreign terrorist fighters accountable for terrorist acts, while also assessing whether alternative means exist to promote their rehabilitation and reintegration.[78]

81. The United Nations High Commissioner for Human Rights has stressed the need to combat impunity and ensure accountability for gross violations of human rights law and serious violations of international humanitarian law through effective investigations and prosecutions to ensure justice, provide redress to victims and prevent further violations. The countries of nationality of foreign fighters should effectively investigate and prosecute those responsible for such violations whenever they can do so.[79] There have been few reported investigations for such acts committed by foreign fighters, with the large majority of reported investigations and prosecutions focusing on domestic terrorism offences. More information is needed to analyse the reasons for this, for example the difficulty of obtaining evidence, or the possible impact of Security Council resolution 2178 (2014) with its focus on terrorist acts.

82. Most of the Member States consulted by the Working Group did not report having a returnee policy. In its report submitted in May 2015, the Security Council Al Qaida Sanctions Committee reported that it received mixed information from Member States on motivations for returning, ranging from disillusionment to taking a break, including to treat injuries, but also to raise funds or further ideological goals or to plot attacks. The Committee pointed out that there are three major themes to returnee policies: screening of returnees to address the risk they pose,

[77] S/2015/123, paras. 41 and 42.
[78] S/2014/807, annex, para. 24.
[79] A/HRC/28/28, para. 44.

development and implementation of de-radicalization programmes, and reintegration.[80]

83. There is a need to explore and compile best practices for the rehabilitation and reintegration of repentant returnees beyond incarceration, or in addition to incarceration if they have committed a crime. The Member States surveyed by the Working Group did not have in place specific rehabilitation programmes for returnees, including imprisoned foreign fighters. Returnees may be traumatized by their experience and suffer from post-traumatic stress disorder, which may render reintegration very difficult. If unaddressed, returnees may exhibit or generate other social problems not linked to terrorism.

84. During its consultations, the Working Group received information on a series of existing rehabilitation and reintegration programmes. There are reportedly 40 international programmes intended to help returnees, although, thus far, very little research has been found to determine whether these programmes are effective. The Danish Aarhus programme attempts to convince and assist individuals to return. The German programme Hayat focuses on deterring aspiring foreign fighters from leaving, or if they do, from refraining to engage in acts of violence and to return home in coordination with the authorities. In prisons in Glasgow, Scotland, the Al-Furqan programme uses imams to challenge extreme views through Islamic teachings. The scheme is voluntary. The Channel programme in the United Kingdom, which is a multi-agency scheme under the Home Office, works with individuals who are vulnerable to radicalization. While participation is voluntary, the programme addresses all types of extremism. Additional good practices may come from States directly affected by armed conflicts that have set up programmes to rehabilitate and reintegrate fighters of non-State armed groups, for example in Somalia with respect to Al-Shabaab.

85. The Working Group has observed that foreign fighters play an important role in recruitment. However, returnee-focused interventions remain few. Repentant and disillusioned returnees may be instrumental in preventing recruitment, including by creating and disseminating credible counter-narratives that resonate with the targeted communities.

VI. Conclusions and recommendations

86. **While there is no legal definition of foreign fighters, there are similarities and differences between foreign fighters and mercenaries that may be observed. In terms of similarities, both mercenaries and foreign fighters are external actors that intervene in an armed conflict. Mercenaries, by definition, are neither nationals of a party to the conflict nor residents of territory controlled by a party to the conflict, while foreign fighters, while they may be nationals of a party to the conflict, do not reside in the conflict-affected State and have travelled from abroad to join the insurgency. Both mercenaries and foreign fighters may also be recruited abroad or locally.**

87. **One difference is that foreign fighter mobilizations may encompass nationals of a party to the conflict, such as from the diaspora, while mercenaries are necessarily non-nationals.**

[80] S/2015/358, para. 58.

88. The main difference examined is that of motivation, and the related role of payment. In the light of the above reporting on the range of motivations, payments and activities of foreign fighters, the assertion may be tentatively made that foreign fighters are a contemporary form of mercenarism or mercenary-related activities.

89. As noted in the case of Tunisia, given the complexity of the foreign fighter phenomenon, efforts at addressing it must be global, holistic, multidimensional and strategic. Any strategic plan should respond to the diverse profiles and recruitment methods, have immediate, medium and long-term impact, balance punitive against social measures and ensure the comprehensive adoption of human rights standards in all its elements.

90. With respect to the direct impact of foreign fighters on human rights, research indicates that while foreign fighters may be included among armed groups on the basis of their prowess, experience and resources, by virtue of their radicalizing and divisive influence and co-opting of the original agenda, they are often a negative factor in terms of the achievement of the goals of the insurgency. They may thus effectively complicate, prolong or undermine armed opposition efforts and thwart struggles towards claiming the right of peoples to self-determination, broadly understood.

91. Foreign fighters have also been documented as perpetrators of a range of human rights violations, in a context where non-State armed groups that exercise effective control over territory, such as ISIL, are increasingly considered to be bound by international human rights obligations in relation to all people within that territory. Violations of human rights and international humanitarian law include executions, sexual slavery, rape and other forms of sexual and gender-based violence, torture, mutilation, forcible displacement, enforced disappearance, the wanton destruction of cultural property and the enlistment and forced recruitment of children.

92. Regarding the responses of States and the international community to increasing global foreign fighter activity, concern is warranted with respect to the broad application of Security Council resolution 2178 (2014). States have adopted measures that disproportionately restrict freedom of movement and the right to nationality, due process and the presumption of innocence, and that unnecessarily expand powers for emergency surveillance, arrest, detention, search and seizure. The Working Group recommends consistent demarcation of the distinction between foreign fighters and foreign terrorist fighters, given the absence of clarity on an international legal definition of terrorism or on foreign fighters. More precise definitions of all of these terms would mitigate the misapplication of the otherwise broad scope given to action under Security Council resolution 2178 (2014), limit human rights infringements and ensure more accurate targeting for accountability.

93. Given the reported difficulties in investigating and prosecuting foreign fighters for activities committed abroad, including in the case of Tunisia, we recommend a framework of international cooperation on the sharing of evidence among countries as a critical step in ensuring accountability for those active in, or supportive of, foreign fighter networks.

94. **Special consideration should be given to the scope of international humanitarian law, whereby mere direct participation in hostilities is not prohibited, nor is it a war crime. Measures designed to prevent and punish travel for the purpose of engagement in, or support of, terrorism should therefore exempt acts that are otherwise lawful under international humanitarian law. In this vein, States must be alert to the potential that policies not informed by international humanitarian law may hinder humanitarian protection and assistance in conflict zones.**

95. **The Working Group emphasizes that State responses to foreign fighters must balance punitive measures with preventive ones, and should ensure rehabilitative opportunities for returning fighters. Emerging good practice such as the Aarhus and Hayat programmes may be instructive in this respect. Endeavours should cover the spectrum of the evolution of foreign fighter activity, including countering violent extremism and preventing the radicalization, recruitment and mobilization of individuals into terrorist groups. States must develop community partnerships to tackle radicalization and provide counter-narratives. Responses must include effective investigations and prosecutions, as well as redress.**

96. **In closing, the Working Group recommends that States and the international community make every effort to operationalize the standard call for the integration of human rights into counter-terrorism and foreign-fighter initiatives, with a comprehensive and practical approach to incorporating international standards into all facets of design, programming and implementation.**